RECENT AMERICAN DECISIONS.

Supreme Court of Massachusetts.

HINCKLEY v. GERMANIA FIRE INSURANCE CO.

The temporary illegal use, without a license, of property insured, if uncontemplated at the time of taking out the policy, would not of itself, and as a matter of law, render the policy void during the whole of the rest of the time which it was to run. It would simply vitiate the policy during the time of the illegal use, and when such illegal use stopped, the policy would revive.

It is not the necessary meaning of the word "void," as used in policies of insurance, that it shall, under all circumstances, imply an absolute and permanent avoidance of a policy which had once begun to run. The meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being.

Where a license is granted to two persons under Pub. St. c. 102, s. 111, to keep a billiard or pool table, or a bowling-alley, for hire, it is available to each of them.

THIS was an action of contract upon a policy of insurance against fire upon a pool table and other saloon fixtures. At the trial in the Superior Court a verdict was ordered for the defendant, and the case reported for the consideration of the Supreme Court.

J. M. & T. C. Day, for plaintiff.

M. & C. A. Williams, for defendant.

The opinion of the court was delivered by

C. ALLEN, J.—The report does not state the grounds upon which the ruling rested, that the plaintiff was not entitled to recover. The defendants, in their brief, rely on various objections, which we have considered.

In the first place, the defendants suggest that there is certainly great doubt whether the license under which the plaintiff was doing business on the day when the policy was dated and delivered was of any validity, since this license ran to both brothers, Edwin and Herbert, though Herbert had ceased to have any interest in the place before the license was dated and issued. No authority is cited or reason assigned for so strict a construction, and we are of opinion that a license duly granted to two persons, under Public Statutes c. 102, s. 111, to keep a billiard or pool table, or a bowling alley, for hire, is available to each of them. This is not like a case where two persons seek to avail themselves of a license granted to only one of them.

It is then urged that, after the license had expired, the plaintiff

kept the insured property, in violation of law, from May 1st 1883, till the last week in June 1883. The policy was dated March 15th 1883, and the license then existing, expired May 1st 1883. The fire occurred on August 6th 1883, and it was conceded that there was no illegal use of the property after the last week of the preceding June, at which time the plaintiff ascertained that his license would not be renewed. The defendants rest their objection on two grounds: *First*, that the illegality and criminality of the plaintiff's act in respect to the injured property, vitiates the policy by operation of law, independently of any express provisions contained in the policy; and, *secondly*, that under a provision of the policy the right to recover was taken away. The authorities cited in support of the first proposition do not support it. In *Kelly* v. *Home Ins. Co.*, 97 Mass. 288, the policy was on intoxicating liquors, which at the time of the insurance, and thereafter to the time of the loss, were intended for sale in violation of law. The policy never attached. There was never a moment when the liquors were not illegally kept, and all that the case decides is that goods so kept at the time when the policy issued, or at the time of the loss, cannot be the subject of a valid insurance. In *Johnson* v. *Union Ins. Co.*, 127 Mass. 555, the facts were similar. The policy was on billiard table, balls, cues, &c., kept without a license at the time the policy was issued, as well as at the time of the loss. The ground of the decision in both of the above cases is stated to be "that the object of the assured in obtaining the policy was to make their illegal business safe and profitable; and that the direct and immediate purpose of the contract of insurance being to protect and encourage an unlawful traffic, the contract was illegal and void, and the policy never attached." The same facts existed in *Lawrence* v. *National Ins. Co.*, 127 Mass. 557. In *Cunard* v. *Hyde*, 2 El. & El. 1, the cargo which was the subject of insurance was partly loaded on deck in violation of law, and while in that condition was totally lost.

In the present case, the plaintiff had a license at the time when the policy issued, and the policy, therefore, was valid when obtained. If it be assumed without discussion that the policy would cease to be operative during the time when the property was kept in use without a license, the question remains whether such temporary illegal use of the property has the effect to avoid the policy altogether or merely to suspend it during the continuance of such illegal use. There is nothing in the case to show that it was proved, as a mat-

ter of fact, that the plaintiff at the time of taking out the policy, intended to make it cover any illegal use of the property. He may have expected to get his license renewed; or, failing in that, he may have intended to close the place where the property was used, as, according to his own testimony, in point of fact he did. Under this state of facts, we are of opinion that the temporary use of the property without a license, if uncontemplated at the time of taking out the policy, would not of itself, and as a matter of law, render the policy void during the whole of the rest of the time which it was to run. If there were any special or peculiar reasons why such absolute invalidity should be declared, they should be made to appear. In the absence of such reasons, such temporary and uncontemplated illegal use of the property should not be visited with so severe a penalty as the absolute avoidance of the policy. It does not appear that the defendants were or would be in any way injuriously affected thereby after such illegal use had ceased. They have the benefit of the temporary suspension of the risk, without any rebate of the premium. There is no hardship to the defendants in requiring them to show an actual injury, or else to avail themselves of the clause in the policy giving them a right to cancel it upon notice, and a return of a ratable proportion of the premium. There is no rule of law preventing the revival of a policy of insurance after a temporary suspension. "The doctrine that the risk may be suspended, and again revive, without an express provision for the purpose, seems to be within the strictest judicial principles:" 1 Phil. Ins. § 975. Accordingly, temporary unseaworthiness, if the ship has become seaworthy again, will not defeat the policy: 1 Phil. Ins. § 730. So as to other stipulations; as, *e. g.*, that of neutral character and conduct: Id. § 975. And in *Worthington* v. *Bearse*, 12 Allen 382, it was held, on great consideration by this court, that if the assured in a marine policy temporarily parts with his interest in the property insured, and afterwards buys it in again, the policy will revive, if there are no express provisions making it void, and there is no increase of risk. As between the insurer and the assured, there is no reason why the former should be allowed to avail himself of a temporary illegal use like that which existed in the present case, unless it can also be shown that the subsequent risk was thereby increased, or the position of the insurer otherwise injuriously affected. And as a matter of general policy, it does not seem reasonable to impose upon the assured so severe a consequence

as the forfeiture of his policy, in addition to the penalty of $100, which the legislature have considered adequate as the maximum punishment for his offence against the public: Pub. Stat. c. 102, s. 111.

It is further contended by the defendants that, however it might be under the general rule of law, the policy contained a provision making it void. In the standard form of policy established by the legislature, which was used in the present case, the matters avoiding a policy are enumerated. Omitting matters not here material, the provision is: "This policy shall be void * * * if the insured shall make any attempt to defraud the company either before or after the loss; or if gunpowder or other articles subject to legal restrictions shall be kept in quantities or manner different from those allowed or prescribed by law; or if camphene, benzine, naphtha, or other chemical oil, or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene or coal oil may be used for lighting." In this Commonwealth, under the statutes for the regulation of trade, and providing for licenses and municipal regulations of police, there are a great many articles which, in a certain sense, may be said to be "subject to legal restriction." Dogs, fish, nails, commercial fertilizers, hacks and horses, in cities, may be referred to as examples. It may well be questioned whether, under the maxim *noscitur a sociis*, the clause in the policy above quoted ought not to be limited in its application to other articles of a character similar to gunpowder, the keeping of which may have a natural tendency to increase the risk. It would be rather a strained construction of this clause to hold that a policy should be void because an unlicensed dog was kept upon the premises; and yet such a dog, being subject to legal restriction, would be kept in a manner different from that allowed by law. It would not be sensible to give to these words the broadest construction of which they are susceptible.

But, irrespectively of this consideration, it is not the necessary meaning of the word "void," as used in policies of insurance, that it shall under all circumstances imply an absolute and permanent avoidance of a policy which had once begun to run; but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being. In Phil. Ins. § 975, it is said: "After it (*i. e.*, the policy) has begun, so that the premium is be-

come due, it surely is but equitable that a temporary non-compliance should have effect only during its continuance. To carry it further is to inflict a penalty on the assured, and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it. A forfeiture certainly ought not to be extended beyond the grounds on which it is incurred. * * * And there does not appear to be any good reason why, in the absence of all fraud and all prejudice to the underwriter, the same doctrine should not be applicable to express conditions in the nature of warranties or conditions, unless by the circumstances, or the express provisions of the policy, such application is excluded." In accordance with this doctrine, a provision in a policy that it should be void, and be surrendered to the directors of the company to be cancelled, in case of alienation of the property by sale or otherwise, was held to be inoperative for the time being; and the assured, upon acquiring title after a sale of the property by him, was held entitled to recover: *Lane* v. *Maine Ins. Co.*, 12 Me. 44. So where a policy provided that "in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent (*i. e.*, of the company), this policy shall from thenceforth be void and of no effect," it was held that after such sale the policy revived upon the assured acquiring again the title, and holding it at the time of the fire: *Power* v. *Ocean Ins. Co.*, 19 La. 28.

The same rule of construction has been applied to provisions against other insurance: *Obermeyer* v. *Globe Ins. Co.*, 43 Mo. 573; *New England Fire & Marine Ins. Co.* v. *Schettler*, 38 Ill. 166; *Mitchell* v. *Lycoming Ins. Co.*, 51 Penn. St. 402. The court in Illinois has gone so far as to apply it also to a provision against an increase of risk, which ceased before the loss: *Schmidt* v. *Peoria Ins. Co.*, 41 Ill. 295; *Ins. Co. of North America* v. *McDowell*, 50 Id. 120, 129. Without at present going beyond what is called for by the circumstances of the present case, we are of opinion that, assuming the temporary use of the property insured, without a license, to come within the prohibition of the policy in the clause above quoted as to gunpowder or other articles subject to legal restriction, yet that clause is not to receive such a construction as to prevent the policy from reviving after such temporary use has ceased.

The only remaining objection urged by the defendant is that the

statements of loss rendered to them by the plaintiff were insufficient, in failing to state that the plaintiff had no legal title to the injured property, and that the Spurrs had an interest in it. But there is no finding as a matter of fact that the plaintiff was not the owner of the property, and upon the report of the case we cannot say, as a matter of law, that it appears that he was not such owner: *Bailey* v. *Hervey*, 135 Mass. 172; *McCarty* v. *Henderson*, 138 Id. 310. Moreover, no attempt to defraud the defendants being proved or charged, the provision of the policy that a statement shall be rendered setting forth the interest of the insured therein was sufficiently complied with. There was no provision calling for an exact statement of his title or interest in detail, and a general statement of ownership was sufficient: *Fowle* v. *Springfield Ins. Co.*, 122 Mass. 191.

New trial granted.

This case presents an interesting question: Will the illegal use of property on premises insured, avoid a policy of insurance thereon?

Questions of this kind have most commonly arisen with reference to marine insurance. The general rule of law undoubtedly is, as stated by Judge STORY, that every contract made for or about a matter or thing which is prohibited, and made unlawful by statute, is a void contract, although the statute does not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition: *Clark* v. *Protection Ins. Co.*, 1 Story 122. See also *Bartlett* v. *Vinor*, Carlton R. 252: *DeBegnis* v. *Armistead*, 10 Bing. 107.

Accordingly it has been decided where the insurance was on goods, a part of which were by law prohibited from exportation, and the voyage as to such goods was illegal in its origin, that therefore the whole policy was void: *Parkin* v. *Dick*, 2 Camp. 221; 11 East 502; *Maryatt* v. *Wilson*, 8 Term R. 31; *Bird* v. *Pigou*, 2 Selwyn N. P. 991. See also, *Law* v. *Goddard*, 12 Mass. 112; *Breed* v. *Eaton*, 10 Id. 21. But while this principle was conceded in *Richardson* v. *Maine F. & M. Ins. Co.*, 6 Mass. 102; it was intimated that insurance was not void on a voyage prohibited by the trade laws of a foreign state, nor on goods contraband of war against capture and condemnation on that account, if in either case the facts are known to the underwriter, and the risks are not excepted in the policy; and in either of the two latter cases if the policy is void as to those particular risks, it is still good against other risks within it. Still another line of cases hold that if the voyage as originally insured was valid, any subsequent illegality in the course of the voyage will not affect the policy, so far as concerns losses on property not tainted by such illegality, although connected with the *res gestæ*: *Butler* v. *Allnutt*, 1 Starkie 222; *Keir* v. *Andrade*, 6 Taunt. 498; *Sewell* v. *Roy. Ex. Ins. Co.*, 4 Id. 855; *Ocean Ins. Co.* v. *Polleys*, 13 Pet. 157. Where a ship was insured on a voyage to Liverpool, and took on board in the port of New Orleans, a chain cable, smuggled by another vessel, and was lost on the voyage to Liverpool by perils of the sea, the underwriters were held liable for a total loss on the policy, and it was held also that the insurance on the chain cable was good, the title being in the owner of the vessel, and the illegality not attaching

to the voyage on which it was used: *Clarke* v. *Protection Ins. Co.*, 1 Story 110.

Coming to contracts to insure property on land, we find that they may be tainted with illegality and avoided. Thus it has been decided that a contract of insurance made on Sunday, and not subsequently ratified is void: *Heller* v. *Crawford*, 37 Ind. 279. It has not been unusual to insert in policies of insurance, a proviso that the insurance should be void if the building or property should be used for any unlawful purpose. Such a proviso is valid and will be enforced. The policy will be vitiated, for example, by a tenant's use of the building for an unlawful purpose, even if without the owners' knowledge: *Kelly* v. *Worcester F. I. Co.*, 97 Mass. 285. And the use of a building for storing whiskey with intent to sell the same therein, and the sale of the same there from time to time, by retail, without a license is a use of the building for an unlawful purpose within the meaning of such a proviso as above mentioned: *Kelly* v. *Worcester M. F. I. Co.*, 97 Mass. 284; *Johnson* v. *Union M. & F. I. Co.*, 127 Id. 555; *Lawrence* v. *National F. I. Co.*, Id. 557. In the Kelly case there appears to have been a proviso in the policy, prohibiting the unlawful use. Such a provision, however, does not appear in the reports of the Johnson and Lawrence cases, and in the Johnson case it is explicitly said, speaking of the Kelly decision, that "the grounds on which that decision was placed, were that the object of the assured in obtaining the policy was to make their illegal business safe and profitable, and that the direct and immediate purpose of the contract of insurance being to protect and encourage an unlawful traffic, the policy was illegal and void, and the policy never attached."

In *Niagara F. I. Co.* v. *DeGraff*, 12 Mich. 124, it is decided that spirituous liquors kept illegally for sale, may notwithstanding, be lawfully insured against destruction by fire, and that the risks insured against are not the consequences of illegal acts, but accidents. The court, Justice CAMPBELL, said: "It was claimed on behalf of the plaintiffs in error that if these liquors can be allowed to be included in a policy, the policy will be to all intents and purposes insuring an illegal traffic; and several cases were cited involving marine policies on unlawful voyages, and lottery insurances, which have been held void on that ground. These cases are not at all parallel, because they rest upon the fact, that in each instance it is made a necessary condition of the policy that the illegal act shall be done. The ship being insured for a certain voyage that voyage is the only one upon which the insurance would apply, and the underwriters become thus directly a party to an illegal act. So insuring a lottery-ticket requires the lottery to be drawn in order to attach the insurance to the risk. If the policy were in express terms a policy insuring the party selling liquors against loss by fine or forfeiture, it would be quite analogous. But this insurance attaches only to property, and the risks insured against are, not the consequences of illegal acts but of accident. Our statute does not in any way destroy or affect the right of property in spirituous liquors or prevent title being transmitted but renders sales unprofitable by preventing the vendor from availing himself of the ordinary advantages of a sale, and also affixes certain penalties: *Hibbard* v. *People*, 4 Mich. 125; *Bagg* v. *Jerome*, 7 Id. 145. If the owner sees fit to retain his property without selling it, or to transmit it into another state or country, he can do so. By insuring his property the insurance company have no concern with the use he may make of it, and as it is susceptible of lawful uses, no one can be held to contract concerning it in an illegal manner, unless the contract itself is for directly illegal purposes. Collateral contracts, in which no illegal design enters, are not affected by an illegal trans-

action with which they may be remotely connected. In the case of *The Ocean Ins. Co.* v. *Polleys*, 13 Pet. 157, an insurance upon a ship known by the insurance company to be liable to forfeiture under the registry laws of the United States, was held valid, and a recovery was permitted for a loss while sailing under papers known to be illegal. The case of *Armstrong* v. *Toler*, 11 Wheat. 258, is still stronger. It is difficult to perceive how public policy can be violated by an insurance of any kind of property recognised by law to exist."

In *Carrigan* v. *Lycoming F. Ins. Co.*, 10 Ins. Law. Jour. 606, it is decided that the illegal sale of liquors, where such sale is but a subordinate part of the legitimate business of a druggist, does not vitiate the policy on his stock including such liquors. The court in this case took the position that a contract directly insuring liquors intended for illegal sale would be void, but that if the contract is collateral and independent, though in some measure connected with acts done in violation of law, it is not void.

In *Jones* v. *Fireman's F. Ins. Co.*, 2 Daly 307, the defendants issued a policy of insurance upon plaintiff's "stock of fireworks—hazardous and extra-hazardous," providing, however, "that the policy shall be null and void whenever any article shall be kept in quantities greater than the law allows, or in a manner different from that prescribed by law, unless said use or keeping is specially provided for in this policy." The plaintiff kept some dangerous "colored lights," contrary to a city ordinance, which "colored lights" ignited and caused the loss: *Held*, that the written provision insuring the fireworks, &c., was not repugnant to or a waiver of the printed part, the meaning being that the plaintiff might keep only such fireworks as it was lawful to keep under the municipal regulations, and he having violated the regulation in keeping the colored lights that caused the fire, he could not recover.

But in *Boardman* v. *Merrimack F. Ins. Co.*, 8 Cush. 583, it was decided that the drawing of a lottery with the consent and participation of the assured in a building insured against loss by fire, as "a shoe manufactory," does not avoid the policy on the building, nor on the stock therein.

ADELBERT HAMILTON.

Court of Errors and Appeals of Maryland.

LOUIS DE BIAN v. CARLOS GOLA.

A consul signing a note as consul is individually liable thereupon.
The consular seal does not make the note a single bill.

APPEAL from the overruling of a motion to quash an attachment in an action of assumpsit founded on promissory notes in the following form:

ROYAL CONSULAR AGENCY OF ITALY,
Baltimore, 2d June 1882.

Received from Charles Gola, Esq., for the use of this Vice-Consulate of Italy, $1500, to be returned within ninety days, with the usual interest and commissions.

[Seal marked.] E. DE MEROLLA.
Royal Consular Agency of Italy.